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IN THE

Supreme Court of the United States

October Term, 1949

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF LOCAL 74 AND JACK HENDERSON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHARLES H. TUTTLE,
FRANCIS X. WARD,
DANIEL F. O'CONNELL,
Attorneys and Counsel for Petitioners,
15 Broad Street,
New York 5, New York.

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-2423-3

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I

The Board's brief makes the following concession of fact (p. 8):

> "Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21; 136-138.)"

In view of this factual concession, there arise the following questions of law of general importance to organized labor and to industry and in the administration of the Act:

1. Does the Act purport to invalidate and annul the "long standing rule" and practice of this and other unions that members will not continue to work on a union job into which, after their employment, non-union workers have been injected,—particularly where such non-union men have been injected to take over portions of the work for which the union men had been employed and which they were performing?

2. If the Act does so purport, is it constitutional?

3. Since, as the Board's brief thus concedes, Henderson gave the order "in accordance" with this long standing rule and gave it before the Act took effect, does the Act purport to require that, after its effectual date, the order be rescinded and the Union's members be ordered back to the work, notwithstanding that the non-union men were in continued possession?

4. If the Act does so import, is it constitutional?

See Points II, III and IV of our Main Brief, pp. 34, 41 and 45.

II

The Board's brief contains the further concessions of fact as to what occurred *"while the work was in progress"* (pp. 6, 7):

> "Watson insisted that its own employees who were non-union, *must install any coverings it sold.* • • • Parker and Stanley discussed the complications that might arise with the union employees employed

> at the Stanley residence if Watson's non-union workmen installed the coverings. * * * Thereupon Stanley made a special contract with Watson for the purchase and installation of the floor and wall coverings." (Italics ours.)

In other words, "while the work was in progress" pursuant to the union contract made by Stanley with Parker (himself a member of the union), and while the union men were satisfactorily performing, Stanley, with full knowledge of the union rule and with full warning by Parker "of the complications that might arise", agreed with Watson to turn over to Watson and its non-union employees a portion of the jobs for which the union men had been employed.

Notwithstanding these concessions of fact, the Board, in substance, rests its case (p. 8) on the finding that at the time when Henderson issued his order on August 21, Stanley asked how the union men could be brought back; and

> "Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work."

But what other way was there? Watson had insisted and Stanley had contracted that Watson's non-union men be injected into union work then satisfactorily in progress under a union contract made in accordance with Stanley's own testimony that "it was my understanding with Parker that union men were going to do the work" (p. 100).

In other words, Watson had demanded, and Stanley had agreed to give Watson by this contract knitting together both purchase and installation, an effective sword whereby it could force its way into this exclusively union work and secure a transfer of some of it to its non-union employees.

Since Watson had with purpose, and Stanley had by contract, created this act of aggression, how could the

union or its members be expected—much less required—to continue with or return to the work in the face of the aggression thus enforced?

How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract?

III

On page 28 of our Main Brief, we stated:

> "As far as we can ascertain, the present case was the first, involving local temporary construction in *a private residence*, to come before the Board."

We then cited four subsequent decisions by the Board dismissing cases "concerning *companies in the building construction industry* on the very ground that their business was primarily local and insubstantial."

Since those decisions, the Board has rendered three further decisions in the building industry, wherein complaints of "secondary boycott" and of alleged violations of Section 8 b 4 (A) of the Act were dismissed.

> *Denver Bldg. Trades Council*, 90 N. L. R. B. No. 66, 26 L. R. R. M. 1225 (June 16, 1950);
> *Plumbers & Steamfitters Union*, 90 N. L. R. B. No. 80, 26 L. R. R. M. 1236 (June 21, 1950);
> *Glazers Union*, 90 N. L. R. B. No. 93, 26 L. R, R. M. 1245 (June 26, 1950).

In the first case cited the Board said, concerning the view urged by its dissenting member (Mr. Reynolds):

> "He urges, in this connection that because the building and construction industry is characterized by relatively small business units, we must take for our policy-criterion in matters of jurisdiction, the sizable annual aggregate business in the industry. Yet, nowhere in the legislative history of the amended

Act or in Board decisions, we find support for this view. The same logic would extend the Federal power to the corner grocer, the neighborhood druggist, and the local restaurant, for each is part of an industry which, in aggregate has an undeniably substantial effect upon interstate commerce. Indeed, we fail to see how any business enterprise, however purely local in character, would then be free from Federal regulation."

In the second case cited, the dismissed complaint was for an alleged "secondary boycott" involving a building contractor and sub-contractors engaged in the construction of a $35,000 Salvation Army building and a $52,000 church, although the general contractor had made purchases "directly in interstate commerce" and had secured contract bonds and various forms of insurance "from companies with home offices outside of the state", and although he had purchased some of his materials from suppliers who, in turn, secured part of their stock from outside the state, and although the sub-contractors purchased materials outside of the state ranging from 25% to 99%.

In the third case cited, to wit: the *Glaezers Union* case, the dismissed complaint was for an alleged "secondary boycott" against members of a building contractors association whose members purchased some materials from without the state. The member with the largest of such purchases purchased about $145,000 annually, of which $13,000 represented materials from without the state.

IV

On page 16 the Board's brief says:

"It is settled that a changed circumstance such as that cited by petitioners, like voluntary discontinuance of an unfair labor practice, will not render moot an order of the Board lawful when made."

This statement seems to imply that what the Board's brief calls "a changed circumstance" occurred after the order of the Board was made. The fact is, and the findings so show, that Stanley's residence was completed even before any charge was filed with the Board. (See our Main Brief, p. 52.)

The fact further is, according to the express finding (R. 27, 53, 60):

> "There was no attempt (by the Petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent." (Parenthesis supplied.)

There was not a particle of evidence that the circumstance thus referred to ever did or ever would arise again, to wit: that an owner, who, like Stanley, had expressly contracted with a union member that the work be done by union men (R. 100), would thereafter, while the work was in progress accordingly, insist on transferring some of it to non-union men.

To disregard these actual facts and findings is, we submit, to reduce the case to academic or moot conceptions, and to authorize a cease and desist order in disregard of the facts, the law and constitutional rights.

Respectfully submitted,

CHARLES H. TUTTLE,
FRANCIS X. WARD,
DANIEL F. O'CONNELL,
Attorneys and Counsel for Petitioners.